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SENATE

REPORT
101-269

AMENDING THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

APRIL 24 (legislative day, APRIL 18), 1990.—Ordered to be printed

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Mr. BIDEN, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 438, as amended]

The Committee on the Judiciary, to which was referred the bill (S. 438) amending the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. 1961 et seq.), having considered the same, reports favorably thereon, with an amendment in the nature of a substitute, and recommends that the bill, as amended, do pass.

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I. PURPOSE

Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO) in 1970. It was designed primarily to be a potent criminal statute aimed at eradicating organized crime syndicates. To this end, RICO introduced several new concepts and broad remedies into the law. Twenty years later, however, the meaning of many of these concepts and remedies is still unclear. Furthermore, the orderly development of the law has been interrupted by the filing of inappropriate actions by private parties under civil RICO. These actions include imaginative attempts to use RICO's treble damages remedy to leverage more favorable settlements in ordinary civil, even familial, disputes.

The combined hammers of the "racketeer" label and possible treble damages relief have been too heavy for these cases. State law and law under Federal statutes are in danger of being usurped and made obsolete by the misuse of civil RICO. And in addition, RICO's original purpose of ridding legitimate business and labor organizations of the insidious encroachment of organized crime is hampered. RICO was meant to be an extraordinary Federal remedy for particularly offensive activities that harmed all of society. When it is used ordinarily, its deterrent and punitive effect is weakened. The use of civil RICO in sexual harassment cases, landlord-tenant disputes, wrongful discharge cases, against unions in labor disputes, and in contract and commercial disputes is not what Congress had in mind when it was debating RICO as a tool to fight organized crime.

Many Federal judges across the judicial and political spectrum have acknowledged the misuse of RICO and the need for reform of the statute. From Justices of the Supreme Court to Federal trial judges, members of the judiciary have expressed dismay at the loose wording of the statute, at its overbreadth, and at its lack of clarity and specificity. These weaknesses have given rise to civil RICO claims ranging far afield from Congress' original purpose in enacting RICO.

Among the comments and criticisms of RICO by Federal judges are the following:

> In its private civil version, RICO is evolving into something quite different from the original conception of its enactors. (Justice White, *Sedima, S.P.R.I.* v. *Imrex., Inc.,* 105 S.Ct. 3275, 3287 (1985).)
>
> [I]t defies rational belief, particularly in light of the legislative history, that Congress intended this far reaching result. (Justice Powell, *Sedima* at 3290.)
>
> RICO is a recurring nightmare for federal courts across the country. Like the Flying Dutchman, the statute refuses to be put to rest. Beating against the wind, it has jettisoned an effusion of opinions which bobble in its wake. (*In Re Dow Co. Sarabond Products Liability Litigation*, 666 F. Supp. 1466 (D. Colo. 1987) (Judge Kane).)
>
> Congress . . . may well have created a runaway treble damage bonanza for the already excessively litigious. (*Schact* v. *Brown,* 711 F.2d 1343, 1361 (7th Cir. 1983) (Judges Wood, Cummings, Hoffman).)

We can only hope that this decision appears to Congress as the distress flag that it is, and that Congress will act to limit, as only it is empowered to, the statute's application to cases such as the one before us now. (*Illinois Dept. of Rev.* v. *Phillips*, 771 F.2d 313, 317 (7th Cir. 1985) (Judges Bauer, Coffey, Campbell).)

A company eager to weaken an offending competitor obeys no constraints when it strikes with the sword of the Racketeer Influenced and Corrupt Organizations Act. . . . It is mot unlikely that Congress envisaged use of the RICO statute in a case such as the one before us. . . . (*Schreider Distributing Co.* v. *Serv-well Furniture Co.*, 806 F.2d. 1393, 1402 (9th Cir. 1986) (Judge Kennedy, concurring opinion).)

An imaginative plaintiff could take virtually any illegal occurrence and point to acts preparatory to the occurrence, usually the use of the telephone or mails, as meeting the requirement of pattern. (*Montesano* v. *Seafirst Commercial Corp.*, 818 F.2d 423, 424 (5th Cir. 1987) (Judges Higginbotham, Politz, Jolly).)

[The plaintiff's] complaint demonstrates at least two facts of life in an urban district court in a litigation-prone society: (1) Hell hath no fury like a Cadillac owner scorned: (2) RICO's lure of treble damages and attorney's fees draws litigants and lawyers, as this Court observed in *Fields* v. *National Bank of Chicago*, 546 F.Supp. 123, 124 (N.D. Ill. 1982), like lemmings to the sea. (*Wolin* v. *Hanley Dawson Cadillac, Inc.*, 636 F.Supp. 890, 891 (N.D. Ill. 1986) (Judge Shadur).)

[W]e note the mounting controversy in the federal courts over the proper limits, if any upon the use of RICO in cases far removed from the context which Congress had in mind when it enacted the statute. . . We don't propose to enter the fray. We only note that the reach of RICO is itself a troubling issue. . . . (*Dan River, Inc.* v. *Icahn*, 701 F.2d. 278, 291 (4th Cir. 1983) (Judges Murnaghan, Winter, Butzner).)

McCarthy, though armed with substantial damage claims, with a requested ad damnum of $312,220 in compensatory and $1 million in punitive damages, obviously cannot resist the treble damages and attorneys' fees lure of RICO. (*McCarthy Cattle Co.* v. *Paine Webber, Inc.*, No. 85C-3328 (N.D. Ill., April 11, 1985), (1985 WL 631) (Judge Shadur).)

. . . [W]ith respect to two types of actions which may be presently brought in federal courts, I think a strong case may be made for at least modification if not repeal. The first of these is diversity jurisdiction, and the second is civil RICO. . . . Civil filings under the Racketeer Influenced and Corrupt Organizations law have increased more than eight-fold over the last five years, to nearly a thousand cases during calendar year 1988. While that number has held steady during the past three years, there is every reason to expect a substantial increase in this already high number because of the statute's lucrative treble dam-

> ages provisions and the extensive coverage recently afforded civil RICO actions by the national media, legal publication, and continuing education programs.
>
> Virtually everyone who has addressed the question agrees that civil RICO is now being used in ways that Congress never intended when it enacted the statute in 1970. Most of the civil suits filed under the statute have nothing to do with organized crime. They are garden-variety civil fraud cases of the type traditionally litigated in state courts. (Chief Justice Rehnquist, speech at the Brookings Eleventh Seminar on the Administration of Justice, April 7, 1989.)

S. 438 is supported by a broad range of organizations including the Department of Justice, the American Bar Association, the National Association of Manufacturers, the Chamber of Commerce of the United States, the AFL–CIO, and the American Civil Liberties Union.

II. LEGISLATIVE HISTORY

During the first session of the 99th Congress, the Senate Judiciary Committee held three hearings on problems associated with the application and use of RICO. The hearings were held on May 20, July 31, and September 24, 1985. The committee heard from a broad cross section of witnesses involved with RICO from Government witnesses to representatives of both plaintiffs and defendants in RICO suits. The committee hearings revealed widespread abuse of the statute resulting in both economic and emotional harm to legitimate businesspersons and in a diminution of the effectiveness of RICO against the infiltration of organized crime into legitimate organizations, such as business and labor, that it had been enacted to curb. Two bills were introduced in the Senate in the 99th Congress. Senator Hatch introduced S. 1521, which attempted to reform RICO by requiring a prior criminal conviction as a prerequisite to a treble damage award and by removing the use of either wire or mail fraud alone as predicate offenses under the statute. Senator Metzenbaum introduced S. 2907 late in the Congress. S. 2907 was the forerunner of the present bill and took many of the same approaches to RICO reform as does the current S. 438.

On October 7, 1986, the House passed H.R. 5445, a RICO reform bill introduced by Congressman Rick Boucher, by a vote of 371–28. On October 17, 1986, Senators Metzenbaum and Bumpers attempted to add the House-passed bill to an appropriations bill. That attempt was tabled by the Senate by a vote of 47–44.

In the 100th Congress, Senator Metzenbaum introduced S. 1523 on July 22, 1987. The committee held hearings on S. 1523 on October 29 and November 19, 1987, and on May 19, 1988. S. 1523 was favorably reported by the committee on May 24, 1988, by a vote of 11–0. Efforts to bring the bill up on the Senate floor in 1988 were not successful.

In the 101st Congress, S. 438 was introduced by Senators DeConcini, Hatch, Symms, and Heflin on February 23, 1989. On June 7, 1989, the committee held a hearing on S. 438. Witnesses testifying in favor of S. 438 included the Department of Justice, the Ameri-

can Bar Association, the AFL–CIO, and the Business Coalition. Appearing in opposition were Bob Blakey (law professor and Senate staffer at the time RICO was enacted), Ralph Nader's consumer groups, the National Association of Attorneys General (represented by Steve Twist of Arizona), the National Association of Insurance Commissioners, and a representative of plaintiff lawyers.

On November 16, 1989, the committee discussed but did not act upon S. 438. At the first executive committee meeting of the following year, on February 1, 1990, Senators DeConcini and Hatch moved an amendment in the nature of a substitute to S. 438, which was passed by the committee by a vote of 12–2.

III. DISCUSSION

The provisions of S. 438 may be divided into several sections. The central reform that the legislation effects relates to the potential damage recovery available to private parties under civil RICO. The other provisions address various matters related to bringing suit under RICO.

Background

The RICO statute currently contains both criminal and civil remedies. Remedies available to the Government under criminal RICO include imprisonment, monetary fines and forfeiture of property. A suit under civil RICO may be brought either by governments or by private persons. Section 1962 of title 18 defines the prohibited conduct, known as "predicate offenses," for both criminal and civil RICO cases.

Possible Monetary Recovery

The principal approach of the legislation is to provide appropriate remedies for various types of civil RICO cases. In general, the purpose of these provisions is twofold: to facilitate the use of civil RICO by victims of patterns of egregious organized criminal conduct, including government agencies and private citizens, and to discourage the misuse of civil RICO in ordinary civil disputes. The committee does not want to impede the fight against genuine criminal conduct; instead, it intends that these RICO amendments will more precisely focus the fight.

The bill divides potential plaintiffs and the amount they can recover into five categories. First, the bill authorizes governmental entities to sue under civil RICO and recover automatic treble damages, costs, and a reasonable attorney's fee. The committee determined not to change current law regarding the ability of governmental entities to recover treble damages. There are few abuses of civil RICO by these governments because of the presence of public opinion against abusive government suits.

In some cases, governments have successfully and responsibly used RICO. For example, the Federal Deposit Insurance Corporation and the Resolution Trust Corporation have used civil RICO to recover losses sustained when an institution fails due to a pattern of criminal fraud. Such failures have cost the taxpayers millions of

dollars and the availability of RICO will deter repetition of the acts that have caused such failures.

Local governments, too, have successfully used civil RICO to redress millions of dollars in losses sustained by the public treasury due to public assistance fraud, the bribery of public officials and arson-for-profit. While there have been isolated complaints about the misuse of RICO by states, the committee is encouraged by efforts of such groups as the National Association of Attorneys General to adopt voluntary guidelines to curb such abuse.

The committee determined not to interfere with this type of activity by governmental entities.

Second, the bill allows specific categories of plaintiffs to recover actual damages to the person's business or property resulting from conduct in violation of section 1962, costs, and reasonable attorneys' fees, and punitive damages of up to twice the actual damages if the plaintiff can prove by clear and convincing evidence that the defendant's actions were consciously malicious, or so egregious and deliberate that malice can be applied. The specified categories of plaintiffs are a unit of local government other than a unit of general local government, a natural person or an organization meeting one of several statutory guidelines such as tax exempt or indentured trustee. Punitive damages of up to twice the actual damages are available if the plaintiff can prove by clear and convincing evidence that the defendant's actions were consciously malicious or so egregious and deliberate that malice can be implied. For guidance in applying this standard, the courts should look to the decisions from which they were adopted in *Tuttle* v. *Raymond,* 449 A.2nd 1353 (Me. 1985) and *Linthicum* v. *Nationwide Life Insurance Co.,* 723 P.2nd 675 (Ariz. 1986).

Third, a natural person suffering serious bodily injury by reason of a crime of violence that is a racketeering activity and that is an element of a violation of section 1962 may, upon proof by a preponderance of evidence, recover costs, including a reasonable attorney's fee, actual damages sustained by the natural person by reason of such violation, and punitive damages up to twice the actual damages if the defendant's actions were consciously malicious or so egregious and deliberate that malice may be implied.

In these first three categories, in which punitive damages may be given, evidence relevant to a finding of punitive damages shall not be introduced except by leave of the court for good cause, until after a finding of liability.

Fourth, the bill allows private persons to recover automatic treble damages, costs and a reasonable attorney's fee against a defendant who engaged in illegal conduct and is convicted of a criminal violation upon which the civil suit is based.

Fifth, persons not meeting the requirements of any of the other categories are eligible to recover actual damages, costs, and a reasonable attorney's fee. Cases in this category have most often been the subject of the claim that civil RICO has been abused. For example, some ordinary civil disputes, including commercial and contract cases, not involving a pattern of criminal behavior, have been filed under civil RICO solely to leverage a more favorable settlement from the defendant. By detrebling the relief recoverable, this legislation is intended to reduce the incentive to transform other

kinds of disputes into Federal "racketeering" cases. The legislation, however, does not abolish a victim's ability to recover his or her loss that results from a pattern of criminal fraud. The bill, therefore, retains an actual damages, costs and fees remedy for those who are injured by criminal conduct prohibited by Federal criminal statutes and which otherwise violates the requirements of RICO. No cause of action under RICO, with the exception of nonviolent free speech, is eliminated.

OTHER ISSUES

The remaining provisions of the bill address several other issues related to civil RICO cases.

1. Burden of proof

Section 4 of the bill codifies current law that the standard of proof in actions brought under civil RICO is "preponderance of the evidence." Although this standard is in the substantial majority across the circuits, the committee believes that the standard should be reflected in the statute.

When punitive damages are recoverable, the plaintiff must prove that the defendant's actions were "consciously malicious or so egregious and deliberate that malice may be implied" by "clear and convincing evidence." The separate, and higher, standard for the award of punitive damages was derived from two State supreme court decisions. The two decisions are *Tuttle* v. *Raymond,* 449 A.2nd 1353 (Me. 1985) and *Linthicum* v. *Nationwide Life Insurance Co.,* 723 P.2nd 675 (Ariz. 1986).

2. Non-violent public speech

Section 3 amends section 1962 to prevent the use of RICO actions as a means of suppressing or penalizing the exercise of first amendment freedoms. The provision was offered as an amendment to the bill by Senator Humphrey and was accepted by the committee.

Subjecting persons to RICO liability based on the excercise of rights protected by the first amendment is a misuse of the RICO statute. While it goes without saying that RICO cannot be used to override constitutional guarantees, RICO's liberal pleading requirements and broad language have been exploited to bring costly and chilling suits based on free speech.

A wide variety of groups and individuals ranging from the American Civil Liberties Union to the Americans United for Life have expressed concern regarding the abuse of RICO to suppress demonstrations and other forms of free speech. Section 3 makes it clear that RICO actions may not be based upon participation in, or the organization or support of, nonviolent protests or similar forms of protected speech. The committee notes that litigants may seek to equate various forms of protected speech and expression with RICO "predicate acts," and thereby use sweeping RICO complaints as a means of suppressing the exercise of legitimate first amendment rights. Such broad complaints can be used to extend RICO claims to encompass persons who have done nothing more than engage in or support lawful, nonviolent protest activities. Section 3 is intended to prohibit such misapplication of the RICO statute.

The provisions of section 3 are limited to speech "undertaken for reasons other than commercial gain or advantage" in order to avoid any implication that activities such as consumer fraud are covered by the section. Section 3 cannot be invoked to exempt such activities from RICO coverage by asserting they constitute protected speech.

3. Statute of limitations

Section 4, amending section 1964(c)(6), establishes a statute of limitations for public and private civil damage actions. Actions brought by the Attorney General or by an authorized legal officer of a Federal, State, or general local government entity may not be commenced more than 6 years after the date the cause of action accrues. All other civil damage actions must be brought by the latest of 4 years after the date the cause of action accrues, or 2 years after a criminal conviction. In all cases, the statute of limitations does not run while a government civil or criminal case related to the conduct alleged in the subsequent civil RICO case is pending.

4. Affirmative defense

The bill codifies an affirmative defense for all cases brought under section 1964(c). The affirmative defense, found in paragraph (7) of the amended section 1964(c), applies to cases in which the defendant acted in good faith and in reliance on an official, directly applicable regulatory action, approval, or interpretation of law by an authorized Federal or State agency in writing or by operation of law. The affirmative defense was carefully drafted to require that the agency action be bona fide. Thus, for example, in an action against an organized crime family alleged to have committed a pattern of criminal conduct relating to gambling, action by local gambling control authority may satisfy the requirements of the affirmative defense only if the agency's action was official, bona fide and not the result of infiltration or subversion of the regulatory process.

The bill establishes a procedure by which parties may receive an early and fair determination of the availability of the affirmative defense. Upon a defendant's motion, which must be made within 90 days after the defendant's answer, the court shall determine the availability of the affirmative defense. Discovery related to the defendant's claim of an affirmative defense will be permitted during the 90-day period and before the court decides the defendant's motion. The court's determination shall occur before the commencement of the full discovery on and consideration of the plaintiff's claim. The court should implement the provisions of this section in accordance with the Federal Rules of Civil Procedure.

5. Bifurcation

In suits in which punitive damages are available, the bill provides that evidence relevant only to the amount of punitive damages to be awarded shall be presented only after a finding of liability. While flexibility is given to the court in permitting alteration of this rule in appropriate circumstances, the committee recognizes the likelihood that the introduction of evidence that bears only on

the amount of punitive damages which may be appropriate may taint the court's decision about whether a finding of liability is warranted. The finding of liability in a civil RICO suit does, after all, require a finding, using a civil preponderance of the evidence standard, that criminal activity was committed. The introduction further of evidence as to damages would tend to prejudice the court in favor of the plaintiff. Upon motion of a party, or in the exercise of the court's discretion, the court may permit earlier introduction of such evidence for good cause and in the absence of any undue prejudice to the defendant.

6. Pleading with particularity

Paragraph (8), amending section 1964(c), requires that facts supporting the claim against each defendant shall be averred with particularity. The provision requires that the RICO plaintiff plead specific facts showing each defendant's culpable conduct. While rule 9 of the Federal Rules of Civil Procedure already requires particularity when pleading fraud cases, this provision makes the requirement uniform for all civil RICO damage actions and for all elements of each RICO claim whether or not fraud is involved.

7. Abatement and survivability

Paragraph (9), amending section 1964(c), provides that an action for damages shall survive the death of the plaintiff or defendant. In the case of bankruptcy, the action shall survive and be enforceable against a receiver in bankruptcy but only to the extent of actual damages.

8. Racketeer label

Paragraph (10), amending section 1964(c), addresses the use of the term "racketeer" in civil suits not containing an allegation of a crime of violence. Instead of the phrase "racketeering activity," "unlawful activity" shall be used in any pleading or other written document, or in any argument, hearing, trial or other oral presentation before the court. Similarly, instead of "pattern of racketeering activity," the phrase "pattern of unlawful activity" is substituted. The bill does not change the nomenclature used in criminal RICO suits.

9. Predicate acts

Section 2 of the bill adds several predicate offenses to section 1961(1). They include: destruction of aircraft or aircraft facilities, arson, acts against foreign officials and other persons, acts against Federal officials and other persons, counterfeiting, forging of Treasury or other certificates, forgery of State and other securities, embezzlement from pension and welfare funds, threats and extortion, fraud and other activity in connection with access devices, fraud in connection with computers, transmission of gambling information, homicide, hostage taking, obstruction of justice, obstruction of criminal investigations, obstruction of State or local law enforcement, tampering with a witness, victim, or an informant, retaliating against a witness, victim, or an informant, sexual exploitation of minors, relating to explosives or dangerous weapons on vessels, interstate transportation of stolen property, trafficking in certain

motor vehicles or motor vehicle parts, and terrorist acts abroad. These offenses were added so that RICO would be a more effective tool to combat patterns of terrorism, organized crime, illegal drug trafficking and white-collar crime.

10. International service of process

Section 6 of the bill amends section 1965 to provide for international service of process related both to parties and witnesses. This section will facilitate the use of civil RICO against international terrorism and was added at the request of the Justice Department.

11. Exclusive Federal jurisdiction

Section 7 provides that all RICO cases must be brought in Federal court. The committee believes that it is appropriate that the Federal courts develop the body of RICO law. Many states presently have state RICO statutes or are considering adopting them. The committee encourages the adoption by states of state statutes to discourage the commission of fraudulent and other criminal acts related to activities that have traditionally been under the jurisdiction of state laws. One of the greatest abuses of the Federal RICO statute that S. 438 is intended to address is the use of Federal RICO in disputes that are more properly resolved under state laws.

12. Application to pending cases

S. 438 applies only to civil actions commenced after the date of enactment.

IV. VOTE OF THE COMMITTEE

On February 1, 1990, with a quorum present, by a vote of 12–2, the Committee on the Judiciary ordered the bill (S. 438) favorably reported.

The committee accepted an amendment in the nature of a substitute offered by Senator DeConcini by unanimous consent.

The committee vote to favorably report S. 438 as amended was as follows:

AYES	NAYS
Biden	Kennedy (by proxy)
DeConcini	Metzenbaum
Leahy	
Heflin	
Simon	
Kohl (by proxy)	
Thurmond	
Hatch	
Simpson	
Grassley (by proxy)	
Specter	
Humphrey	

V. TEXT OF S. 438 AS AMENDED

[101st Cong., 1st Sess.]

A BILL To amend chapter 96 of title 18, United States Code

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as "The RICO Reform Act of 1989".

SEC. 2. ADDITION OF PREDICATE OFFENSES.

Section 1961(1) of title 18, United States Code, is amended—

(1) in subparagraph (A), by inserting "prostitution involving minors," after "extortion,";

(2) in subparagraph (B)—

(A) by striking "section 201" and inserting the following: "Section 32 (relating to destruction of aircraft or aircraft facilities), section 81 (relating to arson), section 112(a), (c)–(f) (relating to protection of foreign officials and other persons), section 115 (relating to acts against Federal officials and other persons), section 201";

(B) by inserting after "sections 471, 472, and 473 (relating to counterfeiting)", the following: "section 510 (relating to forging of Treasury or other securities), section 513 (relating to forgery of State and other securities),";

(C) by inserting after "section 664 (relating to embezzlement from pension and welfare funds)," the following: "section 878 (relating to threats and extortion),";

(D) by inserting after "section 109 (relating to fraud and other activity in connection with access devices)," the following: "section 1030 (relating to fraud in connection with computers),";

(E) by inserting after "section 1084 (relating to the transmission of gambling information)," the following: "sections 1111, 1112, 1114, 1116, and 1117 (relating to homicide), section 1203 (relating to hostage taking),";

(F) by striking out "section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant)," and inserting in lieu thereof the following: "sections 1501–1506, 1508–1513, and 1515 (relating to obstruction of justice)";

(G) by inserting after "sections 2251–2252 (relating to sexual exploitation of minors)," the following: "section 2277 (relating to vessels),";

(H) by inserting after "sections 2314 and 2315 (relating to interstate transportation of stolen property)", the following: "section 2318 (relating to counterfeit materials)"; and

(I) by inserting after "section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts)," the

following: "section 2331 (relating to terrorist acts abroad),";

(3) by striking out "or" at the end of subparagraph (D);

(4) by striking out the semicolon at the end of subparagraph (E) and inserting in lieu thereof ", (F) any offense under section 134 of the Truth in Lending Act (15 U.S.C. 1644), or (G) section 5861(b)–(k) of the Internal Revenue Code of 1986 (relating to firearms controls (26 U.S.C. 5861(b)–(k));".

SEC. 3. NON-VIOLENT PUBLIC SPEECH.

Section 1962 of title 18, United States Code, is amended by adding the following at the end thereof:

"(e) For purposes of this chapter, the term "racketeering activity" shall not include participation in, or the organization or support of, any non-violent demonstration, assembly, protest, rally or similar form of public speech undertaken for reasons other than economic or commercial gain or advantage, and no action may be maintained under this chapter based on such activities."

SEC. 4. BURDEN OF PROOF.

Section 1964(a) of title 18, United States Code, is amended by inserting after "of this chapter by issuing" the following: ", upon proof by a preponderance of the evidence,".

SEC. 5. CIVIL RECOVERY.

Subsection (c) of section 1964 of title 18, United States Code, is amended to read as follows:

"(c)(1)(A) A governmental entity (excluding a unit of local government other than a unit of general local government), whose business or property is injured, or a department of insurance of a State that regulates distribution of funds through a guaranty fund for losses to the guaranty fund caused by the operation of an insurance entity in violation of section 1962 of this title may bring in any appropriate United States district court a civil action therefore and, upon proof by a preponderance of the evidence, shall recover threefold the actual damages to the business or property of the governmental entity sustained by reason of such violation, and shall recover the costs of the civil action, including a reasonable attorney's fee.

"(B) A civil action under subparagraph (A) of this paragraph must be brought by—

"(i) the Attorney General, or other legal officer authorized to sue, if the injury is to the business or property of a governmental entity of the United States, including monies paid out by a governmental corporation by operation of statute requiring compensation of persons for financial loss;

"(ii) the chief legal officer of a State, or other legal officer authorized to sue, if the injury is to the business or property of a governmental entity of the State;

"(iii) the chief legal officer, or other legal officer authorized to sue, of an Indian tribe as defined by 25 U.S.C. 450b(b), if the injury is to the business or property of the Indian tribe;

"(iv) a Commissioner of insurance of a State if authorized by State law to sue, or by certification of the State Attorney General if required by State law, who has been appointed liquida-

tor or rehabilitator of an entity regulated by such Commissioner for losses to the guaranty fund;

"(v) the chief legal officer, or other legal officer authorized to sue, of a unit of general local government of a State, if the injury is to the business or property of the unit of general local government; or

"(vi) a court-appointed trustee, if the injury is to the business or property of an enterprise for which the trustee has been appointed by a United States district court under section 1964(a) of this title.

"(2) A person whose business or property is injured by conduct in violation of section 1962 of this title may bring, in any appropriate United States district court, a civil action therefore and, upon proof by a preponderance of the evidence shall recover—

"(A) the actual damages to the person's business or property sustained by reason of such violation, and the costs of the civil action, including a reasonable attorney's fee;

"(B) the actual damages to the person's business or property sustained by reason of such violation, and the costs of the civil action, including a reasonable attorney's fee, if the person whose business or property is injured is—

"(i) a unit of local government other than a unit of general local government; or

"(ii)(I) a natural person, or an organization meeting the definition of exempt organization under section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)), or an organization meeting the definition of an indenture trustee under the Trust Indenture Act of 1939 (15 U.S.C. 77jjj, et seq.), or an organization meeting the definition of a pension fund under the Employee Retirement Income Security Act (29 U.S.C. 1001, et seq.), or an organization meeting the definition of an investment company under the Investment Company Act of 1940 (15 U.S.C. 80a-1, et seq.); and

"(II) the person is injured by conduct proscribed by section 21A.(a)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78u-1(a)(1)); or

"(iii)(I) a natural person and the injury occurred in connection with a purchase or lease, for personal or noncommercial use or investment, of a product, investment, service, or other property, or a contract for personal or noncommercial use or investment, including a deposit in a bank, thrift, credit union, or other savings institution; and

"(II) neither State nor Federal securities or commodities laws make available an express or implied remedy for the type of behavior on which the claim of the plaintiff is based; and

"(C) punitive damages up to twice the actual damages if the plaintiff may collect under the provisions of subparagraph (B) of this paragraph, and the plaintiff proves by clear and convincing evidence that the defendant's actions were consciously malicious, or so egregious and deliberate that malice may be implied.

In actions in which the plaintiff may collect punitive damages under the provisions of subparagraph (2)(B)(ii) of this paragraph, the calculation of punitive damages shall be consistent with section 21A.(f) of the Securities Exchange Act of 1934 (15 U.S.C. 78u–1(f)), and the assessment of punitive damages against a person employing another person who is liable under this clause shall be consistent with section 21A.(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78u–1(b)).

"(3) A natural person who suffers serious bodily injury by reason of a crime of violence that is racketeering activity and that is an element of a violation of section 1962 of this title may bring a civil action in an appropriate United States district court, and, upon proof by a preponderance of the evidence, shall recover—

"(A) the costs of the civil action, including a reasonable attorney's fee;

"(B) the actual damages to the person's business or property sustained by reason of such violation;

"(C) the actual damages sustained by the natural person by reason of such violation, as allowed under applicable State law (excluding pain and suffering); and

"(D) if the plaintiff proves by clear and convincing evidence that the defendant's actions were consciously malicious or so egregious and deliberate that malice may be implied, punitive damages of up to twice the actual damages.

"(4) In an action under this subsection, evidence relevant only to the amount of punitive damages shall not be introduced until after a finding of liability, except the court may permit, for good cause shown and in the absence of any undue prejudice to the defendant, introduction of such evidence prior to a finding of liability on motion of a party or in the exercise of its discretion.

"(5)(A) A person whose business or property is injured by conduct in violation of section 1962 of this title may bring, in any appropriate United States district court, a civil action therefore and, upon proof by a preponderance of the evidence of such violation, shall recover threefold the actual damages to the person's business or property sustained by reason of such conduct, and the costs of the civil action, including a reasonable attorney's fee, from any defendant convicted of a Federal or State offense described in subparagraph (B).

"(B) The offense referred to in subparagraph (A) must—

"(i) be based upon the same conduct upon which the plaintiff's civil action is based;

"(ii) include a showing of a state of mind as a material element of the offense; and

"(iii) be punishable by death or imprisonment for a term of more than one year.

"(6)(A) Except as provided in subparagraph (B), a civil action or proceeding under this subsection may not be commenced after the latest of—

"(i) four years after the date the cause of action accrues; or

"(ii) two years after the date of the criminal conviction required for an action or proceeding under paragraph (5) of this subsection.

"(B) A civil action brought pursuant to subsection (c)(1)(B) (i), (ii), or (iii) may not be commenced more than 6 years after the date the cause of action accrues.

"(C) The period of limitation provided in subparagraphs (A) and (B) of this paragraph on a cause of action does not run during the pendency of a government civil action or proceeding or criminal case relating to the conduct upon which such cause of action is based.

"(7)(A) It shall be an affirmative defense to an action brought under this subsection that a defendant acted in good faith and in reliance upon an official, directly applicable regulatory action, approval, or interpretation of law by an authorized Federal or State agency in writing or by operation of law.

"(B) Before the commencement of full discovery on and consideration of the plaintiff's claim, the court shall determine, upon defendant's motion, the availability of any affirmative defense asserted under this paragraph. A motion asserting such an affirmative defense shall be filed by a defendant within ninety (90) days after the assertion of such an affirmative defense in the defendant's answer. Discovery related to any such affirmative defense shall be allowed, as provided by law or rule of procedure, during this ninety (90) day period and prior to the court's determination of the availability of such an affirmative defense. The court may extend the time for filing of or discovery on the motion for good cause shown.

"(C) Notwithstanding the provisions of subparagraph B, the court shall permit full discovery on and consideration of the plaintiff's claim (1) if the defendant fails to raise any such affirmative defense in the defendant's first responsive pleading (or motion to dismiss), or (2) if the defendant fails to move for summary judgment or judgment on the pleadings on the affirmative defense within sixty days after service of the defendant's first responsive pleading (or motion to dismiss); provided, however, that the court may extend the time for filing of such motions by agreement of the parties or for good cause shown.

"(8) In an action under this subsection, facts supporting the claim against each defendant shall be averred with particularity.

"(9)(A) An action or proceeding under this subsection shall not abate on the death of the plaintiff or defendant, but shall survive and be enforceable by and against his estate and by and against surviving plaintiffs or defendants.

"(B) An action or proceeding under this subsection shall survive and be enforceable against a receiver in bankruptcy but only to the extent of actual damages.

"(10) In a civil action or proceeding under this subsection in which the complaint does not allege a crime of violence—

"(A) the term 'racketeer' or the term 'organized crime' shall not be used by any party in any pleading or other written document submitted in action, or in any argument, hearing, trail, or other oral presentations before the court; and

"(B) the terms used to define conduct in violation of section 1962 of this title shall be referred to as follows:

"(i) 'racketeering activity', as defined in section 1961(1) of this title, shall be referred to as 'unlawful activity'; and

"(ii) 'pattern or racketeering activity', as defined in section 1961(5) of this title, shall be referred to as 'pattern of unlawful activity'.

"(11) For purposes of this subsection—

"(A) the term 'governmental entity' means the United States or a State, and includes any department, agency, or government corporation of the United States or a State, or any political subdivision of a State which has the power (i) to levy taxes and spend funds, and (ii) to exercise general corporate and police powers;

"(B) the term 'unit of general local government' means any political subdivision of a State which has the power (i) to levy taxes and spend funds, and (ii) to exercise general corporate and police powers; and

"(C) the term 'crime of violence' means an offense involving—

"(i) when chargeable under State law the following: murder, kidnapping, arson, robbery, or dealing in narcotic or other dangerous drugs;

"(ii) when indictable under title 18, United States Code, and when accompanied by serious bodily injury the following: destruction of aircraft or aircraft facilities as defined by section 32; arson as defined by section 81; acts against foreign officials and other persons as defined by sections 112 (a), (c), through (f); acts against Federal officials and other persons as defined by section 115; threats and extortion as defined by section 878; loansharking and other extortionate transactions as defined by sections 891–894; homicide as defined by sections 1111–1112, 1114, 1116–1117; hostage taking as defined in section 1203; obstruction of justice as defined in sections 1501–1506, 1508–1513, and 1515; extortion as defined by section 1951; murder-for-hire as defined by section 1958; sexual exploitation of children as defined in sections 2251–2252 and 2256; explosives or dangerous weapons aboard vessels as defined in section 2277; terrorist acts abroad as defined in section 2331; or

"(iii) the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States.".

SEC. 6. INTERNATIONAL SERVICE OF PROCESS.

Section 1965 of title 18, United States Code, is amended—

(1) in subsection (b) by striking "residing in any other district";

(2) in subsection (b) by striking "in any judicial district of the United States by the marshal thereof" and inserting "anywhere the party may be found";

(3) in subsection (c) by striking "in any other judicial district" and inserting "anywhere the witness is found";

(4) in subsection (c) by striking "in another district"; and

(5) in subsection (d) by striking "in any judicial district in which" and inserting "where".

SEC. 7. EXCLUSIVE FEDERAL JURISDICTION.

Chapter 96 of title 18, United States Code, shall not be construed to confer jurisdiction to hear a criminal or civil proceeding or action under its provisions on a judicial or other forum of a State or local unit of government.

SEC. 8. STYLISTIC AMENDMENT.

The analysis of chapter 96 or title 18, United States Code, is amended by striking out the item for section 1962 and inserting in lieu thereof the following:

"1962. Prohibited activities.".

SEC. 9. EFFECTIVE DATE.

This Act and the amendments made to this Act shall apply with respect to civil actions commenced after the date of the enactment of this act.

VI. SECTION-BY-SECTION ANALYSIS

Section 1

Section 1 is the short title of the bill. The bill may be cited as "The RICO Reform Act of 1989".

Section 2

Section 2 amends RICO by adding predicate offenses to section 1961(1). The committee added these offenses to strengthen and facilitate the use of RICO by law enforcement agencies and consumers. The added provisions create new predicate offenses under both civil and criminal RICO.

Section 3

Section 3 amends section 1962 by adding a provision to clarify Congress' intent that RICO not be used to chill freedom of expression. The purpose of this section is to protect nonviolent public speech such as demonstrations, rallies, protests or assemblies from abusive civil or criminal RICO suits. A RICO action may not be maintained against such activity when it is undertaken for reasons other than economic or commercial gain or advantage.

Section 4

Section 4 establishes the burden of proof in determining liability under section 1964 suits as "preponderance of the evidence."

Section 5

Section 5 amends subsection 1964(c) by modifying the civil recovery section of RICO. In order to target extraordinary remedies for extraordinary situations, the bill creates several different categories of plaintiffs which would be able to claim different specific remedies.

Subsection (c)(1) relates to civil suits for monetary relief brought by various units of government. Subparagraph (A) specifically authorizes the Government to sue under civil RICO for monetary

damages.[1] All entities meeting the definition of "governmental entity," excluding units of local government other than units of general local government, are entitled to recover automatic treble damages, costs, and a reasonable attorney's fee.[2] Such entities include all Federal and State governmental bodies, all units of general local government and trustees appointed by the court under section 1964(a).[3] A "unit of general local government" is any general purpose political subdivision of a State which has the power to levy taxes and spend funds, as well as having general corporate and police powers. Subparagrah (A) codifies prevailing case law that the standard of proof in a governmental RICO civil case is a "preponderance of the evidence."

The text of subparagraph (A) is derived from the current section 1964(c). It is not intended to alter current rules regarding standing, injury, or remedies. Questions have been raised about the ability of Federal governmental corporations to sue under RICO for damages arising out of the savings and loan and financial institution crisis or of State governmental agencies to bring treble damage actions against those who defraud insurance companies. The committee intends for both Federal and State government agencies and governmental corporations to continue to be able to sue for treble damages for losses to the taxpayer and, in the case of Federal deposit insurance funds, for deposit insurance losses. Amendments were added during committee consideration of the bill to subparagraphs (A) and (B) (i) and (v) to clarify the intent of the committee in this regard.

Subparagraph (B) specifies who must bring the civil action under subparagraph (A) in six circumstances. If the injury is to the business or property of the United States, the Attorney General or other legal officer authorized to sue must bring the suit. If the injury is to the business or property of an Indian tribe,[4] the chief legal officer or other legal officer authorized to sue must bring the suit. If the injury is to a fund regulated by a State department of insurance, and the injury is connected to the insolvency or liquidation of an entity engaged in the business of insurance, the Commissioner of Insurance of the State must bring the suit.[5] If the injury is to the business or property of a unit of general local government, the chief legal officer or other officer authorized to sue must bring the suit. The bill itself does not grant a legal officer authority to sue. The committee is aware that tension exists both at the Federal and State levels over the question of which entities are authorized to bring suit in the governments name. The committee intends that this question not be addressed by this legislation. Instead, authority must be found elsewhere in Federal or State law granting a legal officer general authority to sue on behalf of the entity in

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[1] Subparagraph (A) also specifically authorizes departments of insurance of a State that regulates distribution of a fund generated by the regulation of the business of insurance, to sue for injury to the fund in connection with the insolvency or liquidation of an entity engaged in the business of insurance.

[2] Units of local government other than units of general local government are entitled to recover under subsection (C)(2)(B)(i).

[3] The definition of "governmental entity" is found in subsection (c)(11)(A).

[4] As defined by 25 U.S.C. 450b(b).

[5] The Commissioner of Insurance, who has been appointed liquidator or rehabilitator of a regulated entity, must be authorized to sue by State law, or certified by the State attorney general.

question. The authorization need not make specific reference to bringing suit under civil RICO. If a legal officer is currently authorized to bring suit on all matters, it would be qualified to bring suit under civil RICO as well. The bill thus preserves the automatic treble damages, costs, and fees remedy available to governments. Finally, if the injury is to an enterprise for which a trustee has been appointed under 18 U.S.C. 1964(a), the trustee shall bring the suit.

Subsection (c)(2) addresses actions under civil RICO by private persons and units of local government other than units of general local government. This section codifies prevailing case law that the standard of proof in civil RICO cases is a "preponderance of the evidence," except as otherwise provided.

Subparagraphs (A) and (B) make each plaintiff suing under civil RICO eligible to recover actual damages, costs, and a reasonable attorney's fee. Subparagraph (B) further defines three classes of plaintiffs eligible to recover additional damages under subparagraph (C). They are:

(1) Units of local government other than units of general local government,

(2) Natural persons, organizations meeting the definition of exempt organization under section 501(c)(3) of the Internal Revenue Code of 1986,[6] organizations meeting the definition of an indenture trustee under the Trustee Indenture Act of 1939,[7] organizations meeting the definition of a pension fund under the Employee Retirement Income Security Act,[8] or organizations meeting the definition of an investment company under the Investment Company Act of 1940,[9] provided that the injury results from conduct proscribed by section 21A(a)(1) of the Securities Exchange Act of 1934,[10] and

(3) A natural person whose injury is incurred in connection with a purchase or lease, for personal or noncommercial use or investment, of a product, investment, service, or other property, or a contract for personal or noncommercial use or investment, including a deposit in a bank, thrift, credit union, or other savings institution, provided that neither State nor Federal securities or commodities laws make available an express or implied remedy for the type of behavior on which the claim of the plaintiff is based.[11]

Plaintiffs eligible under subparagraph (B) are entitled to receive under subparagraph (C) up to twice actual damages as punitive damages. Other plaintiffs eligible to recover under subsection (A) would not be able to recover a multiple of their actual damages. These plaintiffs' potential recovery has been detrebled because the

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[6] 72 U.S.C. 501(c)(3).
[7] 15 U.S.C. 77jjj, et seq.
[8] 29 U.S.C. 1001, et seq.
[9] 15 U.S.C. 80a-1, et seq.
[10] 15 U.S.C. 78u-1(a)(1).
[11] Consequently, when State or Federal securities or commodities laws make available an express or implied remedy for the type of behavior on which the plaintiff's claim is based, the securities or commodities law violation does not provide the plaintiff with a basis to recover under either subsection (c)(1)(B) or subsection (c)(2)(B). The plaintiff might be eligible under subparagraph (A) to recover his or her actual damages, costs, and reasonable attorneys' fees. The plaintiff's cause of action under subsection (A) is coextensive with her of her cause of action under the securities or commodities laws.

committee concluded that the use of the extraordinary remedy of treble damages was inappropriate in these circumstances given the high rate of misuse of civil RICO by persons within this category. Civil RICO has been inappropriately invoked by plaintiffs in this category to redress injuries in ordinary civil disputes not involving racketeering activity. The specter of automatic treble damages and the "racketeer" label have been misused in these ordinary civil disputes inappropriately to leverage a quicker and larger settlement. This has been unfair to defendants. In addition, this misuse of civil RICO has placed an inappropriate burden on the courts.

It is anticipated that detrebling the potential damages in these cases will reduce the misuse of civil RICO. Civil RICO should, however, remain available to victims of a pattern of criminal fraud or a pattern of other criminal conduct who only fit in this category. While many of these cases would be more appropriately brought in other forums or under other Federal statutes, the ability to recover costs and attorneys' fees in addition to actual damages will help ensure that meritorious suits in this category go forward.

The committee intends that the elements of a RICO action brought under subsection (A) and based upon either a securities law claim or a mail or wire fraud claim involving a securities transaction duplicate the elements of a private claim brought under the federal securities laws. For example, a plaintiff could not recover in a private RICO action based upon a violation of Securities and Exchange Commission Rule 10b–5 if he or she was neither a purchaser nor a seller of a security.

Some courts have so held under existing law. *See Brannan* v. *Eisenstein,* 804 F.2d 1041, 1047 (8th Cir. 1986) (affirming the dismissal of RICO action, on basis that since it "affirmed the dismissal of the securities fraud claims, the same conduct cannot constitute a fraudulent scheme giving rise to a wire fraud claim"); *Forkin* v. *Rooney Pace, Inc.,* 804 F.2d 1047, 1051 (8th Cir. 1986) (affirming dismissal of RICO claims in which district court held that "dismissal of securities fraud claims required dismissal of RICO claims for failure to sufficiently allege predicate acts"); *Moss* v. *Morgan Stanley,* 719 F.2d 5, 19–20 (2d Cir. 1983), *cert. denied,* 465 U.S. 1025 (1984) (dismissal of securities fraud claim undercuts the existence of racketeering activity so that dismissal of RICO claim was justified). *See also Maryvale Academy* v. *Loeb Rhoades & Co.,* 530 F. Supp. 1061, 1070 (N.D. Ill. 1981) (dismissal of securities claims and RICO claims, holding that activity was not fraud "in connection with the purchase or sale of securities"). *But see Ray* v. *Karris,* 780 F.2d 636 (7th Cir. 1985) (dismissal of securities law claims in case alleging both RICO violations and securities fraud, while denying the motion to dismiss the RICO claims); *Horsell Graphic Industries, Ltd.* v. *Valuation Counselors,* 639 F. Supp 1117 (N.D. Ill. 1986) (dismissal of securities law claims and RICO claims with leave to amend RICO claim on the basis that the predicate acts of mail fraud or wire fraud are sufficient to meet the pattern requirement).

Subparagraph (C) allows plaintiffs defined under subparagraph (B) to recover punitive damages of up to twice actual damages in addition to actual damages, costs and fees. In order to collect punitive damages, a plaintiff must prove, by clear and convincing evidence, that the defendant's actions were consciously malicious, or

so egregious and deliberate that malice may be implied. Punitive damages for plaintiffs eligible to recover under subparagraph (2)(B)(ii) shall be calculated in accord with section 21(A)(f) of the Securities Exchange Act of 1934,[12] and the assessment of punitive damages against a person employing another person shall be consistent with section 21(A)(b) of the Securities Exchange Act of 1934.[13] Other than this provision, the committee does not intend this legislation to affect the nature, extent, or application, if any, of respondent superior or other form of vicarious liability under RICO. As noted earlier, all other elements of the plaintiff's case must be proven by the regular civil standard of a "preponderance of the evidence."

Subsection (c)(3) of the bill is a special provision for persons who suffer serious bodily injury as a result of a RICO violation. Heretofore, losses other than injury to business or property have not been compensable under civil RICO. Other losses, however, do occur. For example, law enforcement officials are in constant physical danger on their jobs and may suffer injury due to a RICO violation. Subsection (c)(3) eliminates, in certain cases, the bar to recovery for bodily harm, and permits recovery of up to twice the amount of actual damages in punitive damages, in addition to actual damages, costs, and fees. Punitive damages awards for pain and suffering, however, are not included in this special provision.

The damages recoverable under subsection (c)(3) are subject to several stipulations. First, the conduct violative of section 1962 must include a crime of violence as a predicate act. Second, the bill refers to State law for a definition of those actual damages that are recoverable; the bill provides, however, that pain and suffering are not to be included in the calculation of allowable damages. The identification of State law that applies in determining recoverable damages should be made in the same way as any other choice of law issue.

Subsection (4) requires that evidence relevant only to the amount of punitive damages shall not be introduced until after a finding of liability. The court may permit introduction of such evidence for good cause in the absence of any undue prejudice to the defendant.

Subsection (c)(5) provides for automatic treble damages recovery, in addition to costs and fees, against a defendant in a civil RICO suit who has been convicted for the same conduct upon which the plaintiff's claim is based. The offense must include a showing of a state of mind as a material element of the offense, and the offense must be punishable by death or imprisonment of more than 1 year. The required burden of proof is a "preponderance of the evidence."

Subsection (c)(6) establishes for the first time a codified statute of limitations for civil RICO cases. There are two different limitations periods. The first is contained in subparagraph (A) and is a general limitations period. It provides that a civil action may not be commenced after the latest of:

(1) Four years after the date the cause of action accrues, or

(2) Two years after the criminal conviction needed for an action under subsection (c)(5).

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[12] 15 U.S.C. 78u-1(f).
[13] 15 U.S.C. 78U-1(b).

The second limitations period is contained in subparagraph (B). It applies to actions brought by the Attorney General, or other legal officer authorized to sue on behalf of the United States; actions brought by the chief legal officer of a State or other legal officer authorized to sue on behalf of a State; and actions brought by the chief legal officer or other officer authorized to sue on behalf of an Indian tribe. These actions may not be commenced more than 6 years after the date the cause of action accrues.

Subparagraph (C) provides that these limitations periods do not run during the pendency of a government civil action or criminal case relating to the conduct upon which the cause of action is based.

Subsection (c)(7)(A) establishes a statutory affirmative defense for actions under subsection (c). The affirmative defense applies if the defendant acted in good faith and in reliance upon an official, directly applicable regulatory action, approval or interpretation of law by an authorized Federal or State agency in writing or by an operation of law. This subsection was carefully phrased to cover only a defendant's good-faith conduct and its reliance on a bona fide, directly applicable Federal or State agency's regulatory conduct. Consultation with the Justice Department and with the National Association of Insurance Commissioners resulted in several changes being made in this subsection as it was considered over the last 4 years by the committee. The Department was concerned that defendants should not be able to use the affirmative defense when they had procured the agency's action by infiltration or subversion of the regulatory process. Thus, the committee added the "good faith" requirement.

In addition, the provision already contained the safeguard that to provide an affirmative defense, an agency's action must be "in writing or by operation of law." "Operation of law" refers to the circumstance under which the applicable regulatory scheme accords legal effect to particular actions or events. Thus, for example, if State law requires a regulated company to submit changes in its policies or procedures to the regulatory agency and provides that the agency shall have a fixed number of days to raise objections to the changes, the failure of the agency to disapprove within that statutorily mandated period of time would constitute an approval by "operation of law."

Subsection (c)(7)(B) provides for early determination of the availability of the affirmative defense prior to commencement of full discovery on and consideration of the plaintiff's claim. A defendant must file a motion asserting such an affirmative defense within 90 days of its assertion of the defense in its answer. In fairness to all parties, discovery relating to the defense must be allowed, as necessary, during this 90-day period and before the court makes a ruling on the availability of the affirmative defense. The court may extend the time for filing of, or discovery on, the motion for good cause shown.

The court's implementation of this subsection must conform to applicable laws and procedural rules with regard to discovery.

Subsection (c)(8) requires that facts supporting the claim against each defendant be averred with particularity. Currently rule 9 of the Federal Rules of Civil Procedure provides that "in all aver-

ments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." This subsection expands the requirement of rule 9 so that it applies to the facts purporting to support a civil RICO case. This provision should be applied in the same fashion as rule 9 is applied under the Federal Rules.

Subsection (c)(9) establishes that an action under civil RICO for damages shall survive the death of a plaintiff or defendant. In the event of bankruptcy, the action shall survive and be enforceable against a receiver in bankruptcy. Multiple damages, however, cannot be assessed against a receiver in bankruptcy.

Subsection (c)(10) prohibits the use of the terms "racketeer," "racketeering activity," "pattern of racketeering activity," or "organized crime" in formal pleading or argument before the court, except when the complaint avers a crime of violence. Previous legislation in the 100th Congress would have expanded the prohibitions beyond the scope of the court. Such prohibitions were thought to be too broad and were limited to actual court documents and pleadings. When the civil RICO damage case does not allege a crime of violence as a predicate act, the terms used to define conduct in violation of section 1962 shall be

(1) "unlawful activity" instead of "racketeering activity," and

(2) "pattern of unlawful activity" instead of "pattern of racketeering activity."

Subsection (c)(11) contains three definitions: "governmental entity," "unit of general local government," and "crime of violence." The term "governmental entity" defines persons able to bring suit under subsection (c)(1) for automatic treble damages, costs, and fees. The term "unit of general local government" means any political subdivision of a State which has the power to levy taxes and spend funds and to exercise general corporate and police powers. The term "crime of violence" is defined by specific predicate offenses, such as murder, kidnaping and dealing in narcotics.[14]

Section 6

Section 6 broadens the scope of RICO by providing for international service of process for both parties and witnesses. The purpose of this section is to increase the effectiveness of RICO against international terrorism and international drug trafficking.

Section 7

Section 7 grants to the Federal courts the exclusive jurisdiction to hear RICO cases.

Section 8

Section 8 is a stylistic amendment.

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[14] The complete list of specified predicate offenses is codified in subsections (c)(11)(C) (i), (ii) and (iii).

Section 9

Section 9 addresses the effective date of the bill. The bill shall apply to civil actions commenced after the date of enactment of the bill. Legislation introduced in past Congresses and S. 438, as introduced, would have modified the usual rules of statutory construction. Under the usual rules of statutory construction applied by the Supreme Court, the enacted legislation would have applied to all cases pending on the enactment date. The modification proposed by previous RICO reform proposals would have detrebled most civil RICO actions. An amendment by Senator DeConcini to S. 438 was accepted by the committee. The amendment would make any changes in law enacted by S. 438 applicable only to lawsuits filed after the date of enactment of the act.

VII. COST ESTIMATE

In accordance with paragraph 11(a), rule XXVI, of the Standing Rules of the Senate, the committee offers the Report of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 7, 1990.

Hon. JOSEPH R. BIDEN, Jr.,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 438, the RICO Reform Act of 1989, as ordered reported by the Senate Committee on the Judiciary, February 1, 1990.

CBO estimates that S. 438, if enacted, would not have a significant effect on the federal budget or on the budgets of state or local governments. This conclusion is based on information provided by the Administrative Office of the U.S. Courts (AOC) as well as a number of federal judges and attorneys. S. 438 would amend the Racketeer Influenced Corrupt Organizations (RICO) provisions of Title 18 of the U.S. Code to reduce the damages that can be assessed in most civil RICO cases. Under current law, any plaintiff can seek to recover treble damages and attorney's fees in RICO suits; S. 438 would limit the awards in most cases to actual damages and attorney's fees. The bill would also modify certain procedures for adjudicating RICO cases.

Cost to the Federal Government: This legislation would reduce the workload of the federal courts—and thereby result in a cost savings—if it led to significant reduction in the number of cases brought before federal judges. According to the AOC, RICO cases comprise roughly 1,000 of the 250,000 civil cases brought before federal judges. This figure does not include all cases involving RICO, which is often a part of the basis for cases filed under other statutes. In any event, many judges report that cases involving RICO are more complex to adjudicate and take a disproportionate share of their time.

Nevertheless, it is not clear that this legislation would lead to a significant reduction in cases brought before federal judges or that these cases would be easier to adjudicate. Because S. 438 would

remove the lure of treble damages from private RICO suits, it is possible that fewer cases would be filed. Even if fewer cases are filed, however, a defendant might be less likely to settle a case before trial without the threat of treble damages. Additionally, we do not expect that S. 438 would affect the complexity of RICO cases because the bill primarily addresses the damage award provisions of the statute.

Cost to State and Local Governments: CBO does not expect that enactment of S. 438 would have a significant effect on the budget of any state or local government. The existence of RICO gives plaintiffs an avenue to the federal courts for what often would otherwise be a state offense. To the extent that S. 438 would deter plaintiffs from using RICO as part of their suits, cases might be filed in state courts instead. Nevertheless, a majority of the RICO cases filed in federal courts have an independent basis of jurisdiction.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Michael Sieverts, who can be reached at 226–2860.

ROBERT D. REISCHAUER, *Director.*

VIII. REGULATORY IMPACT STATEMENT

Pursuant to paragraph 11(b), rule XXVI of the Standing Rules of the Senate, the committee, after due consideration, concludes that the act will not have any regulatory impact.

IX. ADDITIONAL VIEWS OF SENATORS HATCH, GRASSLEY, THURMOND, HUMPHREY, AND SIMPSON

We join in the majority report and submit these additional views to address separately one issue pertaining to the substitute bill adopted by the committee.

Reform of civil RICO is long overdue. The civil RICO provisions have been seriously abused. Businesses that have no connection whatsoever to organized crime are labeled racketeers and subjected to the threat of treble damages, a threat that should be aimed at real racketeers.

As explained in this report, this bill properly "detrebles" a variety of civil RICO causes of action. As originally introduced, the bill did not allow prevailing plaintiffs in "detrebled" cases to obtain the costs of their action, including legal fees. Unfortunately, the substitute bill adopted by the committee authorizes prevailing plaintiffs in such cases to obtain costs, including reasonable attorney's fees. While we support the substitute bill, this particular change is unwise and contrary to the rationale of civil RICO reform.

The whole thrust of civil RICO reform is to remove the incentive to misuse an antiracketeering statute in cases where it doesn't belong.

RICO has been used in a whole raft of cases wholly unintended by Congress, including sexual harassment cases, landlord-tenant disputes, wrongful discharge cases, and against a union in a labor dispute.[1] These kinds of cases, and garden-variety commercial contract disputes, should be handled under relevant State laws or other applicable, specific Federal laws. That is why we have detrebled those kinds of cases and made actual damages available. Adding attorney's fees for prevailing plaintiffs will be an incentive to use RICO in the very kinds of cases we are saying elsewhere in the bill should not be brought under RICO.

The usual rule in the United States is that each party pays his or her own attorney's fees, win or lose. The bill as introduced made some narrow exceptions to this rule, by allowing the recovery of attorney's fees in those cases where we have made treble or punitive damages available. Those exceptions are acceptable because in some categories of civil RICO, we believe the availability of enhanced relief remains appropriate.

But, in those cases where we have made only actual damages available there is no rationale for departing from the usual rule that each party pays his or her own attorney's fees.

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[1] RICO has also been used against pro-life demonstrators. Indeed, we are heartened that the committee has seen fit to protect first amendment free-speech rights by prohibiting RICO lawsuits against those individuals or organizations who have participated in any nonviolent demonstration, assembly, protest, rally, or similar form of public speech undertaken for reasons other than economic or commercial gain or advantage.

We undermine the cause of RICO reform by providing this encouragement to bring actions under civil RICO that are more properly brought under State law or other applicable Federal laws.

Senator Hatch did circulate an amendment to the committee before markup, but withheld it in order to facilitate expeditious committee consideration of the bill. The amendment Senator Hatch circulated is intended to permit prevailing small business defendants to recover reasonable attorney's fees in detrebled cases, just as prevailing plaintiffs are being permitted to recover. Restoring the bill's original provision by striking altogether the authorization for costs and attorney's fees for prevailing plaintiffs in detrebled cases is another worthwhile alternative.

This issue may merit further discussion when the bill is considered on the floor.

X. ADDITIONAL VIEWS OF SENATOR HUMPHREY

I fully support enactment of this much-needed RICO reform legislation. S. 438 should help to reduce the widespread abuse of a statute which was never intended as an all-purpose tool for escalating damages in general civil litigation. Since S. 438 reflects a compromise approach to RICO reform, it may not go as far as some would like to prevent inappropriate treble damage claims in the countless varieties of cases where RICO has been misapplied. However, I am satisfied that this bill will result in worthwhile reform of a statute which is in drastic need of such reform.

The bill's provision dealing with RICO abuse in the first amendment area (section 3 of the bill) is especially significant. I agree with the committee report's summary and comments on this provision, but I feel that some additional explanation is appropriate regarding the purpose and effect of section 3.

While RICO's harsh civil remedies—which were designed for use against racketeers and organized crime—have been misapplied in many areas, the most disturbing misues of RICO has been aimed at free speech. During the past several years, RICO suits have been repeatedly used to harass and suppress persons engaged in protests, demonstrations, and other forms of protected speech. While many of these suits have been aimed at pro-life demonstrators protesting abortions, RICO suits could just as easily be used to suppress protests concerning nuclear power, apartheid, or any number of controversial public issues.

The concerns underlying section 3 of S. 438 were well-expressed by Prof. Alan Dershowitz of Harvard Law School, who wrote as follows in a letter to the committee dated November 13, 1989:

> The implications of applying RICO to political protesters are frightening and dangerous to the great tradition of non-violent protest in this country. Especially at a time when we are seeing an increase in political protest throughout the world—even in Communist countries—it is tragic to see our laws being used to frighten protesters by threatening their pocketbooks as well as their liberty.

Section 3 of the bill makes it clear that RICO actions may not be brought against those engaging in nonviolent protests or similar forms of protected speech merely by characterizing the activity in question as a "predicate act" under section 1961(1) of the RICO statute. For example, numerous RICO actions brought against protest groups have alleged that the protest activity constituted a form of "extortion" giving rise to a violation of the Hobbs Act, 18 U.S.C. 1951(b). These lawsuits have also charged persons who organize, promote, or even support demonstrations and protests with RICO violations predicated on the Hobbs Act.

In adopting section 3 of S. 438, the committee rejects the view that nonviolent demonstrations and protests, or related organizational or promotional activities, can form the basis of a RICO violation or constitute predicate acts based on alleged violations of the Hobbs Act. Such a broad construction of the Hobbs Act or other RICO predicate acts sweeps into the protected zone of first amendment freedoms and has an undeniably "chilling effect" on free speech.

While section 3 prohibits RICO suits based on genuine first amendment activity, its exemption does not extend to violent activities. Thus, persons who commit physical assaults and other violent acts cannot claim immunity from RICO suits merely because they were engaged in demonstrations or protests when the violent acts were committed.

Section 3 of S. 438 is necessary to prevent the continued abuse of RICO as a tool for suppressing political protest and other forms of free speech. Thus, S. 438 should be viewed not only as important RICO reform legislation, but as important civil liberties legislation as well.

XI. MINORITY VIEWS OF SENATORS METZENBAUM AND KENNEDY

S. 438's goal of reforming the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO) is a good one. RICO has become an overused claim in too many cases. Although in most instances, nonmeritorious civil RICO claims have been dismissed, there are categories of cases, ranging from domestic relations and decedents' estates to traditional labor-management disputes where civil RICO lawsuits should not be brought. In crafting a remedy for such abuses, however, the bill goes too far, and would unnecessarily deprive consumers of an important remedy against fraud.

Additionally, although the bill has been improved to protect the rights of civil RICO claimants with pending lawsuits, similar protections have not been extended to victims of fraudulent conduct occurring prior to the date of enactment but who have not yet filed suit.

Although S. 438 would allow consumers to bring actions for actual damages plus double punitive damages, it creates a major exception where the plaintiff would otherwise have a cause of action under the Federal securities or commodities laws. This means that victims of securities and commodities fraud, who currently may sue for treble damages under RICO, would be reduced to actual damage remedies.

Recent examples of the rampant fraud involving the purchase and sale of securities and commodities make it obvious that this is the wrong time to be taking away an important investor-consumer remedy against fraud in this area. The country is in the throes of a burgeoning scandal in the fraudulent sale of penny stocks. In 1988 the SEC received 1,510 customer complaints and undertook 43 penny stock actions. Last year those figures had increased to over 3,776 complaints and 68 actions. These figures represent a huge increase in alleged fraud in the last 2 years and reflect a market out of control.

The commodities markets are experiencing similar problems with fraud. Seven of the eleven contract markets are targets of a massive ongoing investigation by the FBI. The exchanges not under investigation make up less than 3 percent of the market. Already there have been 46 indictments. Former Senator Eagleton recently resigned as a member of the Board of Governors of the Chicago Mercantile Exchange, citing widespread fraud in the markets. He concluded that, "the truth, regrettably, is that the public cannot invest in the futures exchanges and be confident that it is getting a fair deal."

We are also concerned by the widespread evidence of corruption in the savings and loan industry, which has experienced losses in the hundreds of billions of dollars. (These losses involve not only the individual victims of such fraud, but those agencies of the Fed-

eral Government and the States that protect our financial institutions. In that regard, we are concerned, too, that these agencies continue to have ample scope to sue under RICO.) The chairman of the Resolution Trust Fund recently testified that fraud was found in 60 percent of the thrifts under RTC control, and that 1,200 criminal referrals have been made to the Justice Department involving S&L insolvencies, borrowers, or agents. Additionally, the FBI has testified that over 21,000 matters relating to financial institutions have been referred to it which it cannot handle for lack of agents.

Although victims of fraud in the securities and commodities markets and the S&L industry will have remedies under the securities laws, they will lose the right to sue for treble damages under RICO if this bill is enacted. When the American public is losing billions of dollars to fraud and the Government is unable to enforce the laws adequately or recover these losses, it is the wrong time to send a signal to criminals that they will be subject only to single damages, and then only if the plaintiff wins a full recovery at trial.

In the last Congress, S. 1523, the predecessor to S. 438, would have maintained the ability of small investors (defined as anyone who owned securities valued at less than or equal to the median portfolio value of all U.S. securities holders or who was a member of a household with an annual income of less than or equal to the U.S. median household income) to bring treble damage actions. The consumers who would most likely fall into the category of small investors are the elderly living on relatively inflexible retirement incomes, and individuals with limited incomes (mostly in the lower or middle class) who have been able to save enough to acquire a small stock portfolio. It is these individual investors who are most vulnerable to fraudulent practices, and most often the target of criminal fraud schemes.

The ability of these consumers to recover more than actual damages, costs, and fees in civil suits increases the deterrent effect of RICO. The threat that those plotting a criminal fraud scheme will be required to return up to three times the amount defrauded is more likely to deter their conduct than the specter of simply returning the amount defrauded.

The ability to recover more than actual damages also increases the likelihood that victims of criminal conduct will fully recover their losses. As a practical matter, single damages will not make these victims whole; after paying attorney's fees and costs, even victorious plaintiffs will still suffer significant losses.

Unfortunately, the small investor protection provision was removed from the bill by the committee last year. This year's bill, S. 438, was introduced without such protection. Victims of fraud need the safeguards afforded by the RICO laws now more than ever. We cannot support RICO reform which does not adequately protect those who are most likely to be seriously injured by securities and commodities fraud and who are least able to protect themselves.

XII. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 438, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets; new matter is printed in italic, existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

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TITLE 18—CRIMES AND CRIMINAL PROCEDURE

* * * * * * *

CHAPTER 96—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

Sec.
1961. Definitions.
[1962. Prohibited racketeering activities.[1]] *1962. Prohibited activities.*
1963. Criminal penalties.
1964. Civil remedies.
1965. Venue and process.
1966. Expedition of actions.
1967. Evidence.
1968. Civil investigative demand.

* * * * * * *

AMENDMENTS

1970—Pub. L. 91-452, title IX, § 901(a), Oct. 15, 1970, 84 Stat. 941, added chapter 96 and items 1961 to 1968.

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in section 3582 of this title; title 7 section 12a; title 28 section 524.

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery,

[1] So in original. Does not conform to catchline.

extortion, *prostitution involving minors,* dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of Title 18, United States Code: [Section 201] *Section 32 (relating to destruction of aircraft or aircraft facilities), section 81 (relating to arson), section 112 (a), (c)–(f) (relating to protection of foreign officials and other persons), section 115 (relating to acts against Federal officials and other persons), section 201* (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), *section 510 (relating to forging of Treasury and other securities), section 513 (relating to forgery of State and other securities),* section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzelment from pension and welfare funds), *section 878 (relating to threats and extortion),* sections 891–894 (relating to extortionate credit transactions), section 1029 (relating to fraud and related activity in connection with access devices), *section 1030 (relating to fraud in connection with computers),* section 1084 (relating to the transmisson of gambling information), *sections 1111, 1112, 1114, 1116, and 1117 (relating to homicide), section 1203 (relating to hostage taking),* section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461–1465 (relating to obscene matter), [section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant),] *sections 1501–1506, 1508–1513, and 1515 (relating to obstruction of justice),* section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphenalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), sections 2251 through 2252 [1] (relating to sexual exploitation of children), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251–2252 (relating to the sexual exploitation of children, *section 2277 (relating to vessels),* sections 2312 and 2313 (relating to interstate transportation of stolen vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), *section 2318 (relating to counterfeit materials),* section 2321 [2] (relating to trafficking in certain motor vehicles

[1] Reference to sections 2251 through 2252 duplicates a similar reference following the reference to section 1958. See 1988 amendment note below.

[2] *Section 2321, substituted for section 2320 in 1988 amendment, Pub. L. 100–690, incorrectly reported out of Committee on the Judiciary as "section 2320."*

or motor vehicle parts), *section 2331 (relating to terrorist acts abroad),* sections 2341–2346 (relating to trafficking in contraband cigarettes), sections 2421–24 (relating to white slave traffic), * * * (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, [or] (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act[;], *(F) any offense under section 134 of the Truth in Lending Act (15 U.S.C. 1644), or (G) section 5861 (b)–(k) of the Internal Revenue Code of 1986 (relating to firearms controls) (26 U.S.C. 5861 (b)–(k));*

* * * * * * *

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly, or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

(e) For purposes of this chapter, the term "racketeering activity" shall not include participation in, or the organization or support of, any non-violent demonstration, assembly, protest, rally or similar form of public speech undertaken for reasons other than economic or commercial gain or advantage, and no action may be maintained under this chapter based on such activities.

* * * * * * *

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing, *upon proof by a preponderance of the evidence,* appropriate orders, including but not limited to: ordering any person to divest himself of any interest, direct or indicrect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which effect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

[(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.]

(c)(1)(A) A governmental entity (excluding a unit of local government other than a unit of general local government), whose business or property is injured, or a department of insurance of a State that regulates distribution of funds through a guaranty fund for losses to the guaranty fund caused by the operation of an insurance entity in violation of section 1962 of this title may bring in any appropriate United States district court a civil action therefore and, upon proof by a preponderance of the evidence, shall recover threefold the actual damages to the business or property of the governmental entity sustained by reason of such violation, and shall recover the costs of the civil action, including a reasonable attorney's fee.

(B) A civil action under subparagraph (A) of this paragraph must be brought by—

(i) the Attorney General, or other legal officer authorized to sue, if the injury is to the business or property of a governmental entity of the United States, including monies paid out by a governmental corporation by operation of statute requiring compensation of persons for financial loss;

(ii) the chief legal officer of a State, or other legal officer authorized to sue, if the injury is to the business or property of a governmental entity of the State;

(iii) the chief legal officer, or other legal officer authorized to sue, of an Indian tribe as defined by 25 U.S.C. 450b(b), if the injury is to the business or property of the Indian tribe;

(iv) a Commissioner of insurance of a State if authorized by State law to sue, or by certification of the State Attorney General if required by State law, who has been appointed liquidator or rehabilitator of an entity regulated by such Commissioner for losses to the guaranty fund;

(v) the chief legal officer, or other legal officer authorized to sue, of a unit of general local government of a State, if the injury is to the business or property of the unit of general local government; or

(vi) a court-appointed trustee, if the injury is to the business or property of an enterprise for which the trustee has been appointed by a United States district court under section 1964(a) of this title.

(2) A person whose business or property is injured by conduct in violation of section 1962 of this title may bring, in any appropriate United States district court, a civil action therefore and, upon proof by a preponderance of the evidence shall recover—

(A) the actual damages to the person's business or property sustained by reason of such violation, and the costs of the civil action, including a reasonable attorney's fee;

(B) the actual damages to the person's business or property sustained by reason of such violation, and the costs of the civil action, including a reasonable attorney's fee, if the person whose business or property is injured is—

(i) a unit of local government other than a unit of general local government; or

(ii)(I) a natural person, or an organization meeting the definition of exempt organization under section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)), or an organization meeting the definition of an indenture trustee under the Trust Indenture Act of 1939 (15 U.S.C. 77jjj, et seq.), or an organization meeting the definition of a pension fund under the Employee Retirement Income Security Act (29 U.S.C. 1001, et seq.), or an organization meeting the definition of an investment company under the Investment Company Act of 1940 (15 U.S.C. 80a–1, et seq.); and

(II) the person is injured by conduct proscribed by section 21A.(a)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78u–1(a)(1)); or

(iii)(I) a natural person and the injury occurred in connection with a purchase or lease, for personal or noncommercial use or investment, of a product, investment, service, or other property, or a contract for personal or noncommercial use or investment, including a deposit in a bank, thrift, credit union, or other savings institution; and

(II) neither State nor Federal securities or commodities laws make available an express or implied remedy for the type of behavior on which the claim of the plaintiff is based; and

(C) punitive damages up to twice the actual damages if the plaintiff may collect under the provisions of subparagraph (B) of this paragraph, and the plaintiff proves by clear and convincing evidence that the defendant's actions were consciously malicious, or so egregious and deliberate that malice may be implied.

In actions in which the plaintiff may collect punitive damages under the provisions of subparagraph (2)(B)(ii) of this paragraph,

the calculation of punitive damages shall be consistent with section 21A.(f) of the Securities Exchange Act of 1934 (15 U.S.C. 78u–1(f)), and the assessment of punitive damages against a person employing another person who is liable under this clause shall be consistent with section 21A.(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78u–1(b)).

(3) A natural person who suffers serious bodily injury by reason of a crime of violence that is racketeering activity and that is an element of a violation of section 1962 of this title may bring a civil action in an appropriate United States district court, and, upon proof by a preponderance of the evidence, shall recover—

(A) the costs of the civil action, including a reasonable attorney's fee;

(B) the actual damages to the person's business or property sustained by reason of such violation;

(C) the actual damages sustained by the natural person by reason of such violation, as allowed under applicable State law (excluding pain and suffering); and

(D) if the plaintiff proves by clear and convincing evidence that the defendant's actions were consciously malicious or so egregious and deliberate that malice may be implied, punitive damages of up to twice the actual damages.

(4) In an action under this subsection, evidence relevant only to the amount of punitive damages shall not be introduced until after a finding of liability, except the court may permit, for good cause shown and in the absence of any undue prejudice to the defendant, introduction of such evidence prior to a finding of liability on motion of a party or in the exercise of its discretion.

(5)(A) A person whose business or property is injured by conduct in violation of section 1962 of this title may bring, in any appropriate United States district court, a civil action therefore and, upon proof by a preponderance of the evidence of such violation, shall recover threefold the actual damages to the person's business or property sustained by reason of such conduct, and the costs of the civil action, including a reasonable attorney's fee, from any defendant convicted of a Federal or State offense described in subparagraph (B).

(B) The offense referred to in subparagraph (A) must—

(i) be based upon the same conduct upon which the plaintiff's civil action is based;

(ii) include a showing of a state or mind as a material element of the offense; and

(iii) be punishable by death or imprisonment for a term of more than one year.

(6)(A) Except as provided in subparagraph (B), a civil action or proceeding under this subsection may not be commenced after the latest of—

(i) four years after the date the cause of action accrues; or

(ii) two years after the date of the criminal conviction required for an action or proceeding under paragraph (5) of this subsection.

(B) A civil action brought pursuant to subsection (c)(1)(B) (i), (ii), or (iii) may not be commenced more than 6 years after the date the cause of action accrues.

(C) The period of limitation provided in subparagraphs (A) and (B) of this paragraph on a cause of action does not run during the pendency of a government civil action or proceeding or criminal case relating to the conduct upon which such cause of action is based.

(7)(A) It shall be an affirmative defense to an action brought under this subsection that a defendant acted in good faith and in reliance upon an official, directly applicable regulatory action, approval, or interpretation of law by an authorized Federal or State agency in writing or by operation of law.

(B) Before the commencement of full discovery on and consideration of the plaintiff's claim, the court shall determine, upon defendant's motion, the availability of any affirmative defense asserted under this paragraph. A motion asserting such an affirmative defense shall be filed by a defendant within ninety (90) days after the assertion of such an affirmative defense in the defendant's answer. Discovery related to any such affirmative defense shall be allowed, as provided by law or rule of procedure, during this ninety (90) day period and prior to the court's determination of the availability of such an affirmative defense. The court may extend the time for filing of or discovery on the motion for good cause shown.

(8) In an action under this subsection, facts supporting the claim against each defendant shall be averred with particularity.

(9)(A) An action or proceeding under this subsection shall not abate on the death of the plaintiff or defendant, but shall survive and be enforceable by and against his estate and by and against surviving plaintiffs or defendants.

(B) An action or proceeding under this subsection shall survive and be enforceable against a receiver in bankruptcy but only to the extent of actual damages.

(10) In a civil action or proceeding under this subsection in which the complaint does not allege a crime of violence—

(A) the term "racketeer" or the term "organized crime" shall not be used by any party in any pleading or other written document submitted in action, or in any argument, hearing, trial, or other oral presentations before the court; and

(B) the terms used to define conduct in violation of section 1962 of this title shall be referred to as follows:

(i) "racketeering activity", as defined in section 1961(1) of this title, shall be referred to as "unlawful activity"; and

(ii) "pattern of racketeering activity", as defined in section 1961(5) of this title, shall be referred to as "pattern of unlawful activity".

(11) For purposes of this subsection—

(A) the term "governmental entity" means the United States or a State, and includes any department, agency, or government corporation of the United States or a State, or any political subdivision of a State which has the power (i) to levy taxes and spend funds, and (ii) to exercise general corporate and police powers;

(B) the term "unit of general local government" means any political subdivision of a State which has the power (i) to levy taxes and spend funds, and (ii) to exercise general corporate and police powers; and

(C) the term "crime of violence" means an offense involving—

(i) when chargeable under State law the following: murder, kidnapping, arson, robbery, or dealing in narcotic or other dangerous drugs;

(ii) when indictable under title 18, United States Code, and when accompanied by serious bodily injury the following: destruction of aircraft or aircraft facilities as defined by section 32; arson as defined by section 81; acts against foreign officials and other person as defined by section 112 (a), (c) through (f); acts against Federal officials and other person as defined by section 115; threats and extortion as defined by section 878; loansharking and other extortionate credit transactions as defined by sections 891–894; homicide as defined by sections 1111–1112, 1114, 1116–1117; hostage taking as defined in section 1203; obstruction of justice as defined in sections 1501–1506, 1508–1513, and 1515; extortion as defined by section 1951; murder-for-hire as defined by section 1958; sexual exploitation of children as defined in sections 2251–2252 and 2256; explosives or dangerous weapons aboard vessels as defined in section 2277; terrorist acts abroad as defined in section 2331; or

(iii) the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States.

* * * * * * *

§ 1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties [residing in any other district] be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served [in any judicial district of the United States by the marshall thereof] *anywhere the party may be found.*

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpoenas issued by such court to compel the attendance of witnesses may be served [in any other judicial district] *anywhere the witness is found*, except that in any

civil action or proceeding no such subpoena shall be issued for service upon any individual who resides [in another district] at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person [in any judicial district in which] *where* such person resides, is found, has an agent, or transacts his affairs.

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